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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. .....

CHRIS PAPALIOLIOS and CHARLES A. WATERS, HUGH REID, ERNEST A. SIMPSON, HORACE KITCHING, WILLIAM F. HAYWARD, WILLIAM SMALLWOOD, JAMES R. READDIE, CHARLES AUGENTHALER, JAMES W. MAXWELL, JOHN F. CAHALANE and JOHN D. KITCHING, doing business under the firm name and style of SIMPSON, SPENCE & YOUNG,

Petitioners,

v.

HARRY M. DURNING, as Collector of Customs of the Port of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit dated January 24, 1951. R. 59.

THE OPINIONS BELOW.

The opinion of the Court of Appeals, R. 61 is reported in 186 F. 2d 308.

The opinion of the District Court, R. 48-52, is reported in 90 F. Supp. 496.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28, United States Code Section 1254.

Questions Presented.

1. May a Collector of Customs lawfully enforce payment of disputed fines claimed under Section 20 (a) (b) of the Immigration Act of 1924, 8 U. S. Code Sec. 167 (a) (b) by denying clearance of a vessel after she had been previously denied clearance and released pursuant to a bond naming the United States as obligee in accordance with the same statute, as security for the payment of the same fines and while a suit by the United States on the clearance bond for the recovery of the fines is still pending?

2. May the master, owner or agent of the vessel, who pays such fines under protest and the coercion of such second denial of clearance, recover the money back on the basis of the unlawful action by the Collector in compelling payment by a second denial of clearance, without further proof?

3. Does an administrative officer have power to impose the fines authorized by Section 20 of the Immigration Act of 1924, 8 U. S. Code, Sec. 167, and if so is his decision immune from judicial review?

Statutes Involved.

Section 20 (a) (b), Title 8 U. S. Code, Sec. 167 (a) (b) provides:

> "(a) Detention of seamen on board vessel until after inspection; detention or deportation; penalty; clearance to vessels. The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge

at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Attorney General to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Prima facie evidence of failure to detain or deport. Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Attorney General."

Title 46 U. S. Code, Sec. 91, which defines the power of Collectors of Customs to grant or deny the clearance of vessels, provides:

"Section 91. Granting clearances. The master or person having the charge or command of any vessel bound to a foreign port, shall deliver to the collector of the district from which such vessel is about to depart, a manifest of all the cargo on board the same, and the value thereof, by him subscribed,

and shall swear to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo, but without specifying the particulars thereof in the clearance, unless required by the master or other person having the charge or command of such vessel so to do * * *."

The Collector is bound to act within the limits of the statute, *Hendricks* v. *Gonzales*, 67 Fed. 351 (C. C. A. 2); Clearance of Vessels, 29 Op. Atty. Gen. 364.

The Proceedings.

In September 1941, the SS. *Loida*, a Greek vessel, arrived at the port of New York with an alien crew. Three of the members of the crew were ordered detained and deported by a United States Immigrant Inspector and the respondent, as Collector of Customs, denied clearance of the vessel as security for the payment of any fines that might be legally incurred for a failure to detain and deport the three seamen. As permitted by the statute, a bond of $3000, the full amount of possible fines, was deposited with the respondent, who thereupon released the vessel from detention. The principal on the bond was Simpson, Spence & Young, New York agents of the vessel, and the surety was National Surety Corporation. R. 9.

Later, fines amounting to $3000 were administratively imposed by the Immigration Service, but mitigated to $1500. The principal and surety on the bond refused to pay the original or mitigated amount on the ground that they were illegally imposed. Suit was brought by the United States against the bond for recovery. The surety on the bond interposed a defense. R. 36, 38.

While that action was still pending the SS. *Loida* again arrived at the port of New York in February 1948, sched-

uled to sail outward on or about March 25, 1948, and the petitioner Chris Papaliolios, master of the vessel, was advised by the respondent that unless the amount of the fines in litigation was paid, clearance of the vessel would again be denied when she was ready to sail. On March 15, 1948 application for clearance was made and refused. R. 39.

Thereupon Papaliolios on March 15, 1948 brought this suit in the United States District Court for the Southern District of New York against the respondent for a declaratory judgment to determine the right of the respondent to make a second denial of clearance. The petitioner also prayed for a preliminary injunction against the respondent to prevent denial of clearance pending the determination of the action. R. 20, 39, 40.

The injunction was denied by the District Court solely on the ground that plaintiff had an adequate remedy at law by paying the fines under protest and suing for recovery if they were unlawfully exacted. Opinion Appendix 1, not reported. That decision was affirmed by the Court of Appeals on the same ground, 167 F. 2d 737. Respondent continued to deny clearance and on or about May 4, 1948, the petitioner, Simpson, Spence & Young, agents of the vessel, in behalf of all interests concerned, paid the disputed fines under protest solely to obtain clearance of the vessel and clearance was granted. R. 19-27; 35-40; 47-50. Leave was then sought by the plaintiff and the agents of the vessel, Simpson Spence & Young, who had paid the fines under protest for the benefit of all concerned, to file an amended and supplemental complaint for recovery of the declaratory judgment and for recovery of a money judgment for the amount paid in lieu of the injunctive relief that had been denied. Such leave was finally granted by the Court of Appeals, R. 28-31, 175 F. 2d 73. The amended and supplemental complaint was then filed. R. 5-10.

The case came on for trial on the issues presented by joint motions by the parties for summary judgment which resulted in a judgment dismissing the amended and supplemental complaint. Decision and judgment, R. 48-54. On appeal to the Court of Appeals the judgment was affirmed on the opinion of the District Court, R. 59, 186 F. 2d. 308.

The Decisions Below.

The decision of the District Court, R. 48-52, 90 F. Supp. 496 which was affirmed by the Court of Appeals on that opinion, R. 59, 186 F. 2d 308, ruled that the respondent might lawfully collect the fines claimed under Section 20 of the Immigration Act of 1924, 8 U. S. Code, Sec. 167 by a further denial of clearance, notwithstanding the fact that the vessel had been previously cleared of liability for the fines by posting a bond to the United States as security and the United States had elected to and was proceeding for collection against the bond.

In reaching that conclusion, the Court recognized the uniform and well settled doctrine of the federal courts that when a vessel is once released from a claim against it by posting a bond or stipulation for value and granted clearance it is forever released from liability on that claim and cannot be submitted to liability again either voluntarily or involuntarily for the same claim. The bond stands in lieu of the vessel.

The Court thought it could perceive a difference between such cases and this one in the sense that in those cases the vessel was in the custody of a court for the satisfaction of a lien or claim of forfeiture or the like, although in practice a vessel may be released on bond with the same result whether before or after actual custody (as for instance, when annual term bonds are given in advance (19 U. S.

Code, secs. 1623-4; 19 C. F. R. 25(4) (18) (19), (25.5(a)). None of the cases has suggested that the doctrine is based on the fact that a lien or custody is involved. Complete release of the vessel is the normal effect of such a bond under whatever circumstances it may be given. Even in this case the vessel was actually in the custody of the respondent when first released on bond, and the owner or master could not have recovered possession without satisfaction of the claim or giving security. The situation amounted to a possessory lien which enabled the respondent to keep possession of the vessel and he released it as directed by the statute on a bond adequate to satisfy the claims.

The reasoning of the Court was as follows, R. 52:

> "• • • The purpose of the withholding of clearance here is to provide a sanction, not to provide a source of satisfaction. The vessel is not seized; nor is a libel filed. The statute does not authorize sale of the vessel were it to remain in port for want of clearance. Since the vessel is not taken into custody, it can hardly be said that the bond substitutes for it as a *res* in custody. The scheme of the statute is that the fine is the primary obligation and that denial of clearance is the sanction to secure prompt payment. The bond is security for the probable obligation pending administrative determination. It is an ameliorative device but it does not undercut the ultimate sanction."

The vice of that argument is that it rests on the foundation that the vessel was not in custody. That patently is not so. The statute, itself, required the vessel to remain in custody until released by the posting of cash or a bond "with sufficient surety to secure the payment • • •", which is only another way of saying that the cash or bond became a substitute for the vessel.

The Court also sought to bolster up the decision by saying, R. 51, that the determination of fines provided by the statute meant administrative determination. It cited only *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, which upheld the imposition of the fines in that case by an administrative officer under an entirely different statute, 8 U. S. Code, Section 146, which expressly empowered that officer to make the decision, but the Court did not decide that such a decision was not subject to review by the courts. Indeed it was reviewing the administrative decision in that case and found it sufficient under the statute there involved.

That point, however, has no bearing on this case. The vessel had been released by the first clearance which took place before an administrative decision was made and that decision was under review by a United States District Court in a suit on the bond by the United States at the time the second clearance was denied. The statute contains no provision for retaking a vessel after she is once released.

Even if the point were relevant it was erroneously decided. The statute does not specify who shall determine liability for fines, but its language indicates that judicial determination was intended. It refers to the burden of proof, Sec. 20 (b); and the same Act, 8 U. S. Code, Sec. 164 vests the United States District Courts with full jurisdiction of all causes, civil and criminal arising under the immigration laws. Usually when administrative determination is intended under those laws it is so specified, e. g., 8 U. S. Code, Sec. 216 (b); 8 U. S. Code, Sec. 145; 8 U. S. Code, Sec. 149; 8 U. S. Code, Sec. 171. However, the Immigration Service has assumed the prerogative of imposing such fines and the courts have generally condoned the practice, but it is well settled in most jurisdictions that administrative decisions under the immigration laws are subject to judicial

review within certain limits, as is true of many types of administrative action:

Lloyd Sabaudo v. *Elting,* 287 U. S. 329, 335, 336, 337 (1932);

Compagnie Generale Transatlantique v. *Elting,* 298 U. S. 217;

Rio Cape Line v. *United States* 89 Ct. Cls. 307, 315;

Sinclair Nav. Co. v. *U. S.* 32 F. 2d 90 (CCA 5, 1929);

U. S. v. *Columbus Marine Corp.,* 62 F. 2d 795 (CCA 2, 1933);

Durning v. *McDonnell & Truda,* 86 F. 2d 91 (CCA 2, 1936);

Bank Line, Ltd. v. *U. S.* 96 F. 2d 52 (CCA 2, 1938).

Lloyd Sabaudo v. *Elting, supra,* involved fines under Section 9 of the Immigration Act of 1917 as amended by the 1924 Act, 8 U. S. Code, Sec. 145, which expressly provides for administrative determination. The others involve fines under the Section under discussion. Many others could be cited.

Thus, both of the reasons advanced in support of the decisions below are unfounded.

The second question is the recoverability of the fines paid to obtain clearance.

Inasmuch as the amended and supplemental complaint was dismissed, the Courts below had no occasion to discuss this question. In the event that this Court should reverse the decision of the lower courts it becomes a question that requires consideration and decision, and there does not appear to be any direct answer in previously decided cases.

The decision of the District Court in denying an injunction (Appendix 1) indicated that the recovery of the fines, if required to be paid to obtain clearance, would follow as a matter of course on a showing that the Collector had unlawfully collected them. It said:

> "If the fine demanded be paid, and if it should be that it was improperly exacted, the payor will have an adequate remedy at law."

Other cases such as *Bull* v. *United States,* 295 U. S. 247 (1935); *United States* v. *State Bank,* 96 U. S. 30 (1877); *Swift Company* v. *United States,* 111 U. S. 22 (1883); *Maxwell* v. *Griswold,* 10 How. 242, 256 (1850); *Robertson* v. *Frank Bros. Co.,* 132 U. S. 17, 23 (1889) and *Rio Cape Line* v. *United States,* 89 Ct. Cls. 307, 315 (1930); indicate the same view, although no decision has been found in the federal courts that provides a direct answer.

It is a question of serious importance which should have an authoritative answer, and in order to avoid further litigation should be answered in this case for the guidance of the lower courts in the event of a reversal of those decisions.

The third question presented, i.e. the finality of administrative action, should be examined and decided because of the diversity of opinion expressed by the courts below and the decisions in the cases cited at page 9 of this petition.

Reasons for Granting Petition.

1. The questions presented raise important questions concerning the administration of the immigration laws which involve the foreign commerce of the United States. The question of the effect of a bond given as security for the release of a vessel for which clearance has been with-

held is of peculiar importance in the administration of the immigration laws because in addition to 8 U. S. Code Sec. 167, those laws contained similar provisions for the collection of fines in 8 U. S. Code Secs. 143, 145, 150, 154, 169, 171, 216. This question has never been passed on by this Court. It should be.

2. There is a clear diversity and conflict as between the decisions below and other decisions of the federal courts as to the effect of granting clearance to vessels, such as *United States* v *Ames,* 99 U. S. 35 (1878); *The Haytian Republic,* 154 U. S. 118 (1893); *The Union,* Fed. Cas. No. 14,346 (4 Blatchf. 90) (C. C. S. D. N. Y., 1857); *The White Squall,* Fed. Cas. No. 17,570 (4 Blatchf. 103); *United States* v. *Davidson,* 50 F. 2d 517 (C. C. A. 1, 1931); *J. K. Welding Co.* v. *Gotham Marine Corporation,* 47 F. 2d 332 (D. C. S. D. N. Y., 1931); *The Ontario* No. 1, 80 F. 2d 85 (C. C. A. 2, 1935); *The Morning Star,* 5 Fed. Supp. 502 (D. C. E. D. N. Y., 1933); *The Nightingale,* 4 Fed. Supp. 494 (U. S. D. C. Conn., 1933); the *Wild Ranger,* 2 New Rep. 403 (Eng. 1863). If the present decision should be allowed to stand it would result in confusion in the application of the principles established by the above cases of long and uniform standing.

3. The requisite showing that is necessary for the recovery of money unlawfully exacted by federal officers, in the circumstances shown in this case, should be stated as a guide to the lower courts in the event the decision below should be reversed.

4. There is a clear diversity and conflict as between the decisions of the courts below and other federal courts cited on page 9 of this petition as to the finality of administrative decisions in the imposition of fines under the immigration laws which should be reconciled by this Court.

This is a question of great importance owing to the tendency of administrative bodies to expand their jurisdiction and authority, a tendency which was ignored by the courts below in disregard of their previous decisions to the contrary, but which has been plainly noticed by this Court in recent decisions.

In *The Great Atlantic and Pacific Tea Company* v. *Supermarket Equipment Corporation,* 340 U. S. 147, Mr. Justice Douglas in a concurring opinion, page 156 remarked:

> "The attempts through the years to get a broader, looser conception of patents than the Constitution contemplates have been persistent. The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction."

This general question and the effect of the Administrative Procedure Act on proceedings and decisions of administrative bodies were reviewed at length by Mr. Justice Frankfurter in *Universal Camera Corporation* v. *National Labor Relations Board,* 339 U. S. 962.

5. Section 20 of the Immigration Act of 1924, 8 U. S. Code, Section 167, provides for burdensome penalties against steamship operators for failure to detain alien seamen on board on arrival at ports in the United States until the seamen are inspected by an immigration officer or for failure to detain and deport any alien seaman ordered detained and deported after inspection, but it is implicit in the section that such a fine does not become effective until the steamship operator is accorded a fair hearing. That is the obvious reason for the provision which permits the release of the vessel from a denial of clearance by posting

a bond with surety sufficient to secure the payment of any fines that may be found to have been incurred as a result of such hearing. For many years the Courts have uniformly recognized that a steamship owner or agent who wishes to contest the validity of fines administratively imposed may do so by defending a suit by the United States on the clearance bond. The following cases may be cited as examples:

United States v. *Columbus Marine Corporation*, 62 F. 2d, 795 (C. C. A. 2d, 1933);

Durning v. *McDonnell & Truda et al.*, 86 F. 2d 91 (C. C. A. 2, 1936);

Indemnity Insurance Co. of North America v. *United States*, 74 F. 2d 22, 23 (C. C. A. 5, 1934);

National Surety Corporation of N. Y. v. *United States*, 104 F. 2d 490 (C. C. A. 4, 1939);

National Surety Corporation v. *United States*, 143 F. 2d 831 (C. C. A. 5, 1944);

Bank Line Limited v. *United States*, 96 F. 2d 52 (C. C. A., 1938);

National Surety Co. v. *Holtzman*, 43 F. 2d 544 (C. C. A. 4, 1930).

In *Durning* v. *McDonnell & Truda, supra,* it was said:

> "It is true that the correctness of his (the immigration officer's) determination is subject to judicial review in an action upon the bond, for 'the bond' secured only valid fines, and if there were none, it was not forfeited."

In *United States* v. *Columbus Marine Corporation, supra,* it was said:

> "• • • the bond secured only valid fines, and if there were none, it was not forfeited."

In *Bank Line* v. *United States, supra*, it was said, page 54:

> "• • • We cannot see why it (the agent) was compelled to pay the fine, or why it should not have defended any action on the bonds."

In *National Surety Co.* v. *Holtzman, supra*, the Court said:

> "• • • Here the surety in executing the bond had directly taken upon itself the responsibility of paying all fines for which the ships were liable."
>
> "• • • The ship, because of the giving of the bond, is released and is not within the jurisdiction of the court, and a proper determination of all issues involved can be had in the present trial."

The practice which has now been adopted for the Collector of Customs to enforce immediate collection of fines, claimed by the Immigration Service, by a denial of clearances of vessels without an opportunity for judicial review is objectionable not only on the ground that it exceeds the collector's authority, but

a. It results in discrimination and a lack of uniformity as between vessels running on regular schedules from foreign ports to the United States and those that arrive infrequently, because vessels of the former class are always available for a second denial of clearance, whereas those of the latter class seldom would be. Those who arrive infrequently would have the advantage of a judicial review by a defense on the bond but the former would not.

b. Successive denials of clearance cause confusion and often delays in scheduled sailings of vessels because clearance papers are usually applied for only shortly before sailing time. The avoidance of this seems the obvious

purpose of the section in providing for a release of the vessel by posting the bond. It is the consistent objective of our laws to expedite rather than to impede the flow of commerce, as witness the Merchant Marine Act of 1936, 46 U. S. Code, Sec. 1101, which recites that the policy is "to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times." Likewise the 1938 amendment of R. S. 4197, 46 U. S. Code, Sec. 91, 92, was "* * * in order that the commerce of the United States may move with expedition and without undue delay, * * *"

c. The practice of enforcing immediate payment by denial of clearance not only deprives a ship operator of judicial review by a defense of an action on the bond, but makes it necessary for him to proceed affirmatively against the Collector for the recovery of money paid, which may be lost without a determination of the merits if he has not taken the precaution of paying the money under protest as has frequently happened.

Bank Line Limited v. *United States*, 96 F. 2d 52 (C. C. A. 2, 1938);

Cunard S. S. Co. v. *Elting*, 97 F. 2d 373 (C. C. A. 2, 1938);

Oceanic Steam Nav. Co. v. *Elting*, 86 F. 2d 110 (C. C. A. 2, 1936);

Deppe et al. v. *Lufkin*, 116 F. 2d 483 (C. C. A. 1, 1940).

d. This action was a test suit not only to determine the right of a Collector of Customs to resort to the summary collection of fines by a second withholding of clearance, but also to avoid the attendant lack of uniformity, discrimination and confusion inherent in such practice.

6. Some precedents for granting a writ of certiorari in cases of this nature are:

Johnson v. *Shaughnessy*, 336 U. S. 806, 808, where the Court said:

> "Certiorari was granted because important questions were raised concerning administration of the immigration laws."

Lau Ow Bew, 141 U. S. 583, 589. This was a petition for a writ of certiorari involving an interpretation of the immigration laws in relation to treaty rights of Chinese merchants. In a fully considered opinion the Court granted the writ, saying:

> "• • • we are of opinion that the grounds of this application are sufficient to call for our interposition."

International Ry. Co. v. *Davidson*, 257 U. S. 506, 516, involved an interpretation of the customs laws and regulations on the right of a Collector of Customs to put into effect measures affecting customs inspection at the terminus of an international toll bridge. The Court said:

> "A writ of certiorari was also applied for and the question presented is of sufficient importance to require determination by this court."

Brooklyn Sav. Bank v. *O'Neil*, 324 U. S. 697, 702, in which the Court said:

> "Because the decision of the Circuit Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court, we granted certiorari • • •".

A few later cases which are indicative of the practice of this court in reviewing questions of importance are:

Wilmette Park District v. *Campbell, Collector of Internal Revenue,* 338 U. S. 411, 414:

> "Because the questions presented have importance in the administration of the admissions tax sections of the Code, we granted certiorari."

Kiefer-Stewart Company v. *Joseph E. Seagram & Sons, Inc., et al.,* 340 U. S. 211, 212-213:

> "Doubt as to the correctness of the decision on questions important in antitrust litigation prompted us to grant certiorari."

National Labor Relations Board v. *Gullett Gin Company, Inc.,* 340 U. S. 361, 362:

> "We granted certiorari because of the importance of the question presented in the administration of the Act." National Labor Relations Act.

62 Cases, More or Less, etc. v. *The United States of America,* decided March 26, 1951, page 3:

> "We granted certiorari, 340 U. S. 890, because of the importance of the question in the administration of the Federal Food, Drug, and Cosmetic Act."

Lloyd Sabaudo v. *Elting,* 287 U. S. 329 (1932) and *Compagnia Generale Transatlantique* v. *Elting,* 298 U. S. 217 (1936) were brought to this Court by writs of certiorari for the determination of important questions arising under the immigration laws, 8 U. S. Code, Secs. 145 and 167.

It is submitted that the questions presented in this case are of equal importance.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue to review the decisions of the courts below.

CHRIS PAPALIOLIOS and CHARLES A. WATERS *et al.*, doing business under the firm name and style of Simpson Spence & Young,

By DELBERT M. TIBBETTS,
Counsel for Petitioners.

Dated: New York, April 18, 1951.

APPENDIX I.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHRIS PAPALIOLIOS,
Plaintiff,

v.

HARRY M. DURNING, as Collector of Customs of the Port of New York,
Defendant.

KNOX, D. J.:

Under the provisions of Section 20 of the Immigration Act of 1924 (8 U. S. C. Sec. 167), the Board of Immigration Appeals of the Department of Justice imposed fines amounting to $3,000 against the agents of the *S.S. Loida* on account of the alleged desertion of three alien seamen from that ship in 1941. Subsequently the fine was mitigated to $1,500 under the 1944 amendment to Section 167.

Upon being served with a notice of liability for the fine the agents filed a bond for $3,000. with the Collector of Customs. The agents contend that the fine was invalid, and the United States has instituted suit to recover on the bond, which action is still pending.

Meanwhile, the *Loida* has returned to this port, and the Collector refuses to grant clearance unless the fine is paid, maintaining that he can not grant clearance under the wording of Section 167. The Master of the ship has brought this suit for an injunction against this refusal to issue clearance. The position of the plaintiff is that the Collector has no claim whatsoever against the ship, but that when the bond was filed and the vessel permitted to sail in 1941 the entire claim was transferred to the bond alone.

Injunctive relief is denied. If the fine demanded be paid, and if it should be that it was improperly exacted, the payor will have an adequate remedy at law. Cruickshank *v.* Bidwell, 176 U. S. 73 (1900). The fine may be paid under protest and the vessel may proceed on her way. Cunard SS. Co. *v.* Elting, 97 Fed. (2d) 373 (C. C. A. 2d, 1938). While it may be difficult to appreciate the position which the Collector has taken, there is threatened no such irreparable injury as would justify injunctive relief. Cf. Administrative Procedure Act, Section 10.

April 13, 1948.

JNO. C. KNOX,
U. S. D. J.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 683

CHRIS PAPALIOLIOS AND CHARLES A. WATERS, HUGH REID, ERNEST A. SIMPSON, HORACE KITCHING, WILLIAM F. HAYWARD, WILLIAM SMALLWOOD, JAMES R. READDIE, CHARLES AUGENTHALER, JAMES W. MAXWELL, JOHN F. CAHALANE AND JOHN D. KITCHING, DOING BUSINESS UNDER THE NAME AND STYLE OF SIMPSON, SPENCE & YOUNG, PETITIONERS

v.

HARRY M. DURNING, AS COLLECTOR OF CUSTOMS OF THE PORT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 59) is reported in 186 F. 2d 308, and the opinion of the District Court (R. 48-52) is reported in 90 F. Supp. 496.

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1951 (R. 60). The petition for a writ of certiorari was filed on April 20, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under section 20 of the Immigration Act of 1924, the Collector of Customs is authorized to deny clearance to a vessel for non-payment of fines imposed for failure to detain alien seamen on a prior occasion, although on that prior occasion, before imposition of the fines, clearance had been granted upon deposit of a bond to secure payment of such fines as might be imposed.

2. Whether the statute requires the fines imposed by section 20 to be administratively or judicially determined.

3. Whether petitioners were denied judicial review of the administrative action in determining the fine, where their complaint attacked merely the method of collection.

STATUTES INVOLVED

Sec. 20 of the Immigration Act of 1924, 43 Stat. 153, 164 (8 U.S.C. 167):

> (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in

charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Attorney General [1] to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Proof that an alien seaman did not appear upon the outgoing manifest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be prima facie evidence of a failure to detain or deport after requirement by the immigration officer or the Attorney General.

(c) If the Attorney General finds that deportation of the alien seaman on the vessel on

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[1] "Attorney General" was substituted for "Secretary of Labor" by Reorg. Plan No. V, June 14, 1940, 5 Fed. Reg. 2423, 54 Stat. 1238.

> which he arrived would cause undue hardship to such seaman he may cause him to be deported on another vessel at the expense of the vessel on which he arrived, and such vessel shall not be granted clearance until such expense has been paid or its payment guaranteed to the satisfaction of the Attorney General.

The following was added at the end of subsection (a) by Act of December 19, 1944 (58 Stat. 817):

> The Attorney General may, upon application in writing therefor, mitigate such penalty to not less than $200 for each seaman in respect of whom such failure occurs, upon such terms as the Attorney General in his discretion shall think proper. This section, as amended, shall apply to all penalties arising subsequent to June 5, 1940.

STATEMENT

On September 8, 1941, the SS. Loida, a vessel of Panamanian registry, arrived at the Port of New York (R. 35). On that day, an order to detain certain alien seamen aboard was served on her master and, the following day, on the vessel's agents, petitioner firm of Simpson, Spence and Young. On September 11, 1941, the master advised the United States Immigration Service that three of the seamen were not aboard. In order to obtain the vessel's clearance, the agents filed a surety bond for $3,000 with the Collector of Customs of the Port, whereupon clearance was approved (R. 35.)

On September 16, 1941, a notice of liability for fines in the sum of $3,000 was served upon the agents, who thereupon filed a protest with the Immigration and Naturalization Service (R. 35-36). On November 14, 1942, the Board of Immigration Appeals, after making appropriate findings of fact and conclusion of law, ordered the agents to pay a fine of $3,000 for failure to detain the three alien seamen, and its order was, on November 19, 1942, confirmed by the Administrative Assistant to the Attorney General (R. 36). After appropriate demands for payment (R. 36-38), the United States began suit on June 24, 1943, against the parties to the bond (R. 38). With the consent of the Attorney General, the suit was held in abeyance pending congressional action on a proposed amendment to section 20, giving the Attorney General authority to mitigate the fines to not less than $200 for each seaman not detained (R. 38).

The amendment, *supra,* p. 4, was enacted on December 19, 1944. On March 15, 1945, the agents petitioned for mitigation under the amendment and on December 4, 1947, the fine was mitigated to the sum of $1,500 (R. 38-39). Demand for payment of the mitigated fine was made, but it had not been paid when, on February 9, 1948, the SS. Loida reentered the Port of New York. Petitioners, the then master (Chris Papaliolios) and the firm of Simpson, Spence and Young, were immediately

notified that the vessel would not be cleared until the fine had been paid (R. 39).

Clearance having been denied, Chris Papaliolios filed suit on March 15, 1948, in the United States District Court against the collector of customs for a declaratory judgment construing section 20(a) and for an injunction preventing the Collector from requiring payment of the fine as a condition for clearance of the vessel (R. 39-40). Their motion for a preliminary injunction pending the suit was denied by the District Court on April 13, 1948, on the ground that, since they could secure clearance of the vessel by paying the fine, and could recover the amount paid if improperly imposed, they had an adequate remedy at law (App. I to petition).[2] On May 4, 1948, this order was affirmed by the Court of Appeals (167 F. 2d 737). On that day, May 4, 1948, the fine was paid under protest (R. 40).

On June 25, 1948, motions for intervention by Simpson, Spence & Young and for leave to file a supplemental complaint were denied and the defendant's motion to dismiss was granted[3] (R. 40). This action of the District Court was reversed on appeal (175 F. 2d 73). The Court of

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[2] By affidavit, H. J. Elmiger, Administrative Officer in the Office of the Collector of Customs, Port of New York, stated, on April 13, 1948, that the course of action pursued by the Collector of Customs had been followed since the passage of section 20 of the Immigration Act of 1924 (R. 40).

[3] On March 15, 1949, the Government's action on the clearance bond was dismissed (R. 40).

Appeals held that the District Court should have allowed the complaint to be amended so that the suit could continue as one for the recovery of the fine and should have permitted the agents to intervene. It also held that the declaratory action was not moot if petitioners could show that the Collector was likely to continue the action of requiring payment of a fine as a condition to clearance of a vessel after it had once been cleared on bond.

After remand, petitioners filed an amended and supplemental complaint (R. 5-8) alleging that "The action of the defendant in exacting payment of the [fine] as a condition to clearance of the SS. Loida was illegal and in excess of his authority and should be repaid" and that he would continue this practice. It prayed for "a declaratory judgment construing Section 20(a) of the Immigration Act of 1924 with respect to the right or authority of the defendant to withhold clearance of a vessel to enforce payment of fines under said section theretofore administratively imposed in a case in which a clearance has previously been granted pursuant to a bond accepted by the Collector of Customs for that purpose, and awarding judgment for the plaintiffs for the sum of $1,500, together with interest and costs and such other relief as may be appropriate."

After the Collector answered (R. 11-16), petitioners moved for summary judgment (R. 17-27)

and the Collector, in effect, filed a cross-motion for summary judgment (R. 32-47).

The District Court granted the Collector's cross-motion, denied recovery of the fine and held that section 20(a) authorized the Collector to proceed in the manner in which he did (R. 48-52). The Court of Appeals "Affirmed on the opinion of the District Court" (R. 59).

ARGUMENT

1. Petitioners contend that section 20 does not empower the collector of customs to deny clearance to a vessel after it has previously been cleared on bond for the payment of fines imposed by that section even though the fines remain unpaid (Pet. 6-8, 14-15). The plain language of the section supports the action of the collector. Its mandate is that "No vessel shall be granted clearance" where either of two circumstances exists: (1) "pending the determination of the liability to the payment of such fine" and (2) "while the fine remains unpaid." The section contains an exception to this requirement where the first circumstance exists; it provides "that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof." It grants no exception in the second situation. The statute not only authorizes the collector, but requires him, without exception, to deny clearance to the vessel after the fine is imposed and

while it remains unpaid. The fact that clearance was granted prior to the determination of the fine upon the deposit of a bond, in accordance with the statute, cannot nullify the absolute, unqualified requirement that "No vessel shall be granted clearance * * * while the fine remains unpaid."

This provision was derived from those contained in Section 9 of the Immigration Act of 1917 (39 Stat. 880) and Section 3 of the Act of May 11, 1922 (42 Stat. 540), which provided for a fine on those transporting into the United States diseased or mentally defective aliens and aliens inadmissible under the immigration laws, respectively. Each prohibited granting clearance to the vessel until the fine was paid except that clearance could be granted prior to its determination upon the deposit of a sum sufficient to cover the fine. These sections were extended and reenacted as sections 26 and 16 of the Immigration Act of 1924.

The prohibition against granting clearance was first introduced into the immigration laws by section 9 of the Act of March 3, 1903 (32 Stat. 1215), a precursor of Section 26 of the Immigration Act of 1924. That section provided that "no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid." It did not contain a provision for withholding clearance prior to the fixing of the fine and there was no provision for granting clearance to the vessel upon the deposit of a bond or money. Thus, in its origin the

only means for enforcing payment of the fines was the withholding of clearance to the ship.

When the prohibition against clearance was extended to the period prior to the determination of the fine, Congress made provision for clearing the vessel during that period upon the deposit of a bond or money. No such provision was made for the time after the fine was fixed and remained unpaid. There is good reason for this difference. The basic means which the statute provides for enforcing payment of the fine is the withholding of clearance. After the fine is imposed, a vessel can secure clearance by paying it. Without the bond provision, however, a vessel cannot by any means secure clearance during the time that the question of liability is being determined. This could result in idling for months a vessel which has not been determined to have violated the law. When, however, the liability has been fixed, it is clear that such liability is to be enforced in the manner provided by the statute, refusal of clearance.

It is undisputed that this practice of withholding clearance to vessels where a fine has not been paid, regardless of whether it has been cleared on bond before the imposition of the fine, has been followed ever since the passage of the Immigration Act of 1924 (R. 7-8, 24-25, 40). This administrative construction and practice was implicitly approved by Congress in 1944 when it amended section 20

(Act of December 19, 1944, *supra*, p. 4) without changing the provision concerning clearance. *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114-115; *Lang* v. *Commissioner*, 304 U. S. 264, 270; *Helvering* v. *Bliss*, 293 U. S. 144, 151.

Petitioners argue that the means provided by Section 20 for enforcing payment of the fines is analogous to an *in rem* action against a vessel (Pet. 6-7). It is the admiralty rule in such actions that a bond submitted to the court in which the action is pending, in connection with a stipulation as to the value of the vessel, takes its place and releases it from liability for the obligation. There are, however, basic differences between the provisions of section 20 and an admiralty action against a ship. In admiralty the ship is responsible for satisfaction of the obligation; it is the *res* which is proceeded against in court. When a sufficiently secure bond of the same value as the ship is submitted to the court, it substitutes the bond for the ship, and the suit continues as one against the bond which has become the *res*.[4]

Under Section 20, however, there is no *res* for which a bond can be substituted. If no bond were filed, no proceeding could be had against the ship as such. The bond given is not for the value of the ship, but for the approximate value of the fines which may be imposed.

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[4] The cases cited by petitioners on page 11 of their petition are admiralty cases and, since they do not involve section 20, are not in conflict with the decision below.

Section 32 of the Immigration Act of 1917 (39 Stat. 895), the precursor of section 20, provided for an admiralty action to secure payment of the fines: it made the vessel liable for the fines and provided that it could be "seized and proceeded against by way of libel." But this provision was completely abandoned by Congress when it enacted section 20; it provides that the "owner, charterer, agent, consignee, or master" shall be liable for the fines and makes provision for enforcing their payment by denying clearance to the vessel. We must therefore assume that Congress thought the latter method of enforcement was better.[5] Its advantage is apparent. The ship is not a source for payment of the fines; the provision for withholding clearance is a coercive means for forcing those obligated for the fines to pay them. The former contemplates court action by the collector; the latter requires no affirmative action by him. Under section 20 the bond cannot become a substituted *res* of equal value for the ship because the ship is not liable for the fines. Nor can the bond be sub-

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[5] In *The City of Athens*, 73 F. Supp. 362 (D. Md.), the court held that the collector could deny clearance to a ship which had been sold free of liens and no longer belonged to those charged with the fines. The court said (p. 364): "While the ship was sold free of liens, it is to be importantly noted that the statute as now in force does not create a lien; but that the administrative withholding of the clearance certificate has been substituted as a more effective remedy by the government than the provisions of the former superseded statute which did impose a lien." See also *Lancashire Shipping Co.* v. *Durning*, 98 F. 2d 751, 752 (C.A. 2), certiorari denied, 305 U.S. 365.

stituted for the right of the collector to deny clearance to the ship without injuring the Government, for by doing so its means of forcing payment by coercion is destroyed and it can secure payment only by instituting an action in court.[6] It is clearly the purpose of the statute that nothing short of payment shall abrogate the remedy of enforcing the fines through refusal of clearance.

2. Petitioners argue that the fines imposed by section 20 are to be judicially determined (Pet. 8). Although section 20 does not expressly state who shall make that determination, we think the act read as a whole shows that it is to be made by the Attorney General. Almost every power granted or duty imposed by the act is an administrative one. The act explicitly gives the Attorney General authority to determine other fines which are similar to those imposed by section 20. Thus section 16, which imposes a fine for transporting immigrants without proper immigration visas, and, like section 20, makes it payable to the collector of customs and contains a provision concerning clearance, empowers the Attorney General to determine the fine. Section 26, which imposes a fine for transporting into the United States aliens who are diseased, mentally defective, unable to read or of an excluded race, empowers the Attorney General to

[6] In an admiralty action, on the other hand, no such change is effected by substituting for the ship a bond of equal value for, in either event, the Government must prosecute the action to a successful conclusion in order to recover.

determine the fine, makes it payable to the collector of customs and contains a clearance provision.

Moreover, the other powers granted or duties imposed by sections 19 and 20 are administrative. Inadmissible alien seamen are permitted to land in the United States "pursuant to such regulations as the Attorney General may prescribe." An immigration officer is required to inspect the seamen of an arriving vessel and such officer or the Attorney General may require that alien seamen be detained or deported. "If the Attorney General finds that deportation of the alien seaman on the vessel on which he arrived would cause undue hardship to such seaman he may cause him to be deported on another vessel at the expense of the vessel on which he arrived." The fines must be paid to the collector of customs and bonds submitted to secure their payment must be approved by the collector of customs, not by the court.[7]

The fines imposed by section 20 have been administratively determined ever since the passage of the act in 1924, and this practice was implicitly ratified by Congress in 1944 (see, *supra,* pp. 10-11).

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[7] We think 8 U.S.C. 164 was intended only to designate the particular courts to have "jurisdiction of all [judicial] causes, civil and criminal, arising under any of the provisions of this Act," and not to give the courts additional functions. It should be noted that this section is not in the Immigration Act of 1924, as petitioners state (Pet. 8), but is section 25 of the Immigration Act of 1917 (39 Stat. 893). The provision of section 20 concerning the burden of proof, referred to by petitioners (Pet. 8), is as appropriate for an administrative determination as for a judicial one.

In *Lloyd Royal Belge Societe Anonyme* v. *Elting,* 61 F. 2d 745 (C.A. 2), certiorari denied, 289 U. S. 730, the question "whether section 20 of the Immigration Act of 1924 authorizes the imposition of a fine by administrative action or whether it requires the United States or the collector of customs to bring a court action in order to have the fine judicially imposed" (61 F. 2d at 746) was thoroughly considered; the court concluded that section 20 authorizes the imposition of a fine by administrative action. To the same effect, see *West Indian Co.* v. *Root,* 151 F. 2d 493, 496 (C.A. 3); *British Empire Steam Nav. Co.* v. *Elting,* 74 F. 2d 204, 206 (C.A. 2), certiorari denied, 295 U.S. 736; *National Surety Co.* v. *Holtzman,* 43 F. 2d 544, 546 (C.A. 4); *Navigazione Libera Triestina* v. *United States,* 36 F. 2d 631, 634 (C.A. 9).

3. Petitioners make an argument concerning judicial review of the administrative action in determining the fine (Pet. 8, 10, 11-14). They apparently contend either (a) that the court below denied them judicial review of the administrative action or (b) that it is the state of the law that judicial review can be had in a suit on a bond, but not in a suit to recover a fine paid under protest, and therefore that the action of the collector deprived them of an opportunity for review. Neither contention is valid.

Petitioners did not allege, contend or show in the District Court that the fine was improperly or il-

legally imposed, that they were not afforded a fair hearing by the administrative officer, that there was an erroneous application of the law or a lack of proper proof of their obligation to pay the fine. They moved for a summary judgment, basing their claim for recovery of the fine on the ground that it was illegally exacted from them as a condition of clearance. Since no issue of judicial review of the administrative action in determining the fine was raised in the District Court, it, and consequently the Court of Appeals, properly did not review the administrative action in imposing the fine or determine whether petitioners could have secured judicial review of the administrative action. See *Navigazione Libera Triestina* v. *United States,* 36 F. 2d 631, 634 (C.A. 9). Petitioners' assertion that the decision below is in conflict with the cases concerning judicial review of administrative action cited on page 9 of their petition (Pet. 10) is obviously incorrect because that issue was not involved in the decision below.

On a proper showing, petitioners could have obtained judicial review, with the usual limitations, in this suit to recover the fine paid under protest. See *Compagnie Generale Transatlantique* v. *Elting,* 298 U. S. 217; *West Indian Co.* v. *Root,* 151 F. 2d 493 (C.A. 3); *British Empire Steam Nav. Co.* v. *Elting,* 74 F. 2d 204 (C.A. 2), certiorari denied, 295 U. S. 736; *Lancashire Shipping Co.* v. *Elting,* 70 F. 2d 699 (C.A. 2), certiorari denied, 293 U. S. 594;

Lloyd Royal Belge Societe Anonyme v. *Elting*, 61 F. 2d 745 (C.A. 2), certiorari denied, 289 U. S. 730; *Sinclair Nav. Co.* v. *United States*, 32 F. 2d 90 (C.A. 5). Since, however, they did not, and still do not, contend that any error was committed in imposing that fine, there was and is no occasion for such review.[8]

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[8] Petitioners raise a question as to their right to recover the fine "on the basis of the unlawful action by the Collector in compelling payment by a second denial of clearance, without further proof," and regardless of the legality of the imposition of the fine in the first instance. (Pet. 2, 9-10.) Since that issue would not arise unless the action in denying clearance should be deemed invalid, it is not presently before this Court. The absence of a right of recovery may not render the other questions moot, in view of petitioners' request for a declaratory judgment. (See opinion of the District Court finding that the case was not moot (R. 50-51).)

On the merits of their right to recover on this theory, it should be noted that petitioners have not stated a cause of action which would justify repayment of the fines.

A fine or tax improperly or erroneously exacted is recoverable only where the claimant shows that he is equitably entitled to its restitution; that its retention would injure him and unjustly enrich the Government. See *Stone* v. *White*, 301 U.S. 532, 534-539; *Atlantic Coast Line Railroad Co.* v. *Florida*, 295 U.S. 301, 309-311; *Lewis* v. *Reynolds*, 284 U.S. 281; *Helvering* v. *Schine Chain Theatres*, 121 F. 2d 948, 950 (C.A. 2); *Ryan* v. *Alexander*, 118 F. 2d 744, 748 (C.A. 10); *Bank Line* v. *United States*, 96 F. 2d 52, 54 (C.A. 2); *Hadley* v. *United States*, 87 Fed. Supp. 590, 595 (D. Mass.). As pointed out above, petitioners have made no such showing.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1951.

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